

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

CORRECTED COPY

77-40028

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4028
78-4047

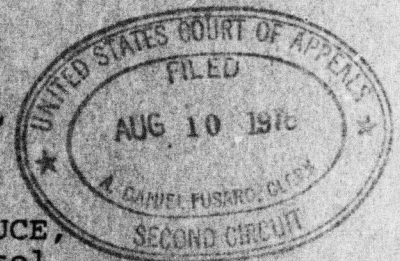
ITT WORLD COMMUNICATIONS INC., et al.,
Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

GRAPHNET SYSTEMS, INC., et al.,
Intervenors.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION



JOHN H. SHENEFIELD,
Assistant Attorney General,

ROBERT R. BRUCE,
General Counsel,

ROBERT J. NICHOLSON,
Attorney,

DANIEL M. ARMSTRONG,
Associate General Counsel,

DANIEL J. CONWAY,
Attorney.

GREGORY M. CHRISTOPHER,
Counsel.

Department of Justice
Washington, D.C. 20530

Federal Communications Commission
Washington, D.C. 20554

TABLE OF CONTENTS

	<u>Page</u>
COUNTERSTATEMENT OF THE CASE	2
1. The Commission's Decision.	3
2. Denial of Reconsideration.	11
ARGUMENT	18
I. THE GRANT OF AUTHORITY TO GRAPHNET AND TELENET TO HELP SATISFY AN UNMET PUBLIC NEED, SUBJECT TO CONTINUAL COMMISSION MONITORING AND THE POSSIBILITY OF APPROPRIATE MODIFICATION, WAS NOT AN ABUSE OF THE AGENCY'S BROAD DISCRETION.	19
A. Petitioner's Have Failed to Rebut the Principal Commission Finding that the Grants to Graphnet and Telenet Would Satisfy Important Public Needs.	21
B. The Commission's Finding that the Grants to Graphnet and Telenet Would not Have a Significantly Adverse Impact is Supported by Substantial Record Evidence.	23
C. Section 222 of the Communications Act Does Not Bar the Service Proposed by Graphnet and Telenet.	30
CONCLUSION	34
ADDENDA	



TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>AT&T v. FCC</u> , 572 F.2d 17 (2nd Cir. 1978).	3
<u>AT&T v. FCC</u> , 539 F.2d 767 (D.C. Cir. 1976).	22
<u>AT&T v. FCC</u> , 487 F.2d 864 (2nd Cir. 1973).	30
<u>Bell Tel. Co. of Penn. v. FCC</u> , 503 F.2d 1250 (3rd Cir. 1974).	24
<u>Carroll Broadcasting Co. v. FCC</u> , 258 F.2d 440 (D.C. Cir. 1958).	26
<u>Coastal Bend TV Co. v. FCC</u> , 234 F.2d 686 (D.C. Cir. 1956).	21
<u>Committee for Open Media v. FCC</u> , 533 F.2d 1 (D.C. Cir. 1976).	33
<u>FCC v. RCA Communications, Inc.</u> , 346 U.S. 86 (1953).	19
<u>Gross v. FCC</u> , 480 F.2d 1288 (2nd Cir. 1973).	31
<u>Hawaiian Telephone Co. v. FCC</u> , 498 F.2d 771 (D.C. Cir. 1974).	19,20,25,28
<u>ITT World Comm., Inc. v. FCC</u> , 555 F.2d 1125 (2nd Cir. 1977).	5,12
<u>MCI Telecommunications Corp. v. FCC</u> , 561 F.2d 365 (D.C. Cir. 1977).	27
<u>N.L.R.B. v. Bell Aerospace Co.</u> , 416 U.S. 267 (1974).	24
<u>Network Project v. FCC</u> , 511 F.2d 786 (D.C. Cir. 1975).	24
<u>North Carolina Util. Comm. v. FCC</u> , 552 F.2d 1036 (4th Cir. 1977).	28
<u>Pocket Phone Broadcast Service v. FCC</u> , 538 F.2d 447 (D.C. Cir. 1976).	22

Cases:

Page

<u>SEC v. Chenery</u> , 332 U.S. 194 (1947).	21,24
<u>Udall v. Tallman</u> , 380 U.S. 1 (1965).	33
<u>Unemployment Compensation Comm. v. Aragon</u> , 329 U.S. 143 (1946).	31
<u>Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council</u> , 98 S. Ct. 1197 (1978).	24
<u>Washington Util. and Transp. Comm. v. FCC</u> , 513 F.2d 1142 (9th Cir. 1975).	6,22,24
<u>Western Union International, Inc. v. FCC</u> , 544 F.2d 87 (2nd Cir. 1976).	32

Administrative Decisions and Reports:

<u>AT&T</u> , 18 FCC 2d 402 (1969).	12
<u>Communications Satellite Corp.</u> , 1 FCC 2d 82 (1965).	22
<u>Domestic Communications Satellite Corp.</u> , 34 FCC 2d 9 (1972).	32
<u>Graphnet Systems, Inc.</u> , 67 FCC 2d 1059 (1978).	27
<u>Notice of Inquiry and Further Notice of Proposed Rulemaking</u> , FCC 78-511 (July 28, 1978).	9,25
<u>Notice of Inquiry and Proposed Rulemaking</u> , 38 FCC 2d 543 (1972).	9,25
<u>Overseas Dataphone Decision</u> , 57 FCC 2d 705 (1976).	5,12
<u>RCA Global Comm., Inc.</u> , FCC 78-513 (Aug. 1, 1978).	29
<u>RCA Global Comm., Inc.</u> , 56 FCC 2d 660 (1975).	8

	<u>Page</u>
<u>RCA Global Comm., Inc., 42 FCC 2d 774</u> <u>(1973).</u>	32
<u>Regulatory Policies Concerning Resale and</u> <u>Shared Use of Common Services and</u> <u>Facilities, 47 FCC 2d 644 (1974).</u>	3
<u>Resale and Shared Use of Common Carrier</u> <u>Services, 60 FCC 2d 261 (1976).</u>	3
<u>Specialized Common Carrier Services, 29</u> <u>FCC 2d 870 (1971).</u>	6,14,23
<u>TRT Telecommunications Corp., 46 FCC 2d</u> <u>1042 (1974).</u>	22
<u>United States Transmission Systems, Inc.,</u> <u>51 FCC 2d 207 (1975).</u>	29
<u>United States Transmission Systems, Inc.,</u> <u>48 FCC 2d 859 (1974).</u>	29
 <u>Statutes and Regulations:</u>	
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 through 609:	
Section 151	9,18
Section 214	19
Section 222	7,30
Section 405	22,31

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4028
78-4047

ITT WORLD COMMUNICATIONS INC., et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

GRAPHNET SYSTEMS, INC., et al.,
Intervenors.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF THE ISSUE PRESENTED

Whether the grant of developmental authority to Graphnet and Telenet, in response to an evident public need for their service, was an abuse of discretion in the absence of probable adverse impact, where the Commission promised continual monitoring, evaluation, and any necessary regulatory modification.

COUNTERSTATEMENT OF THE CASE

Under review is the FCC's grant of authority to Graphnet Systems, Inc., and Telenet Communications Corporation to extend their communications services from the mainland United States to specified locations in Europe. Challenges to the new competition were filed by the major international record carriers, ITT World Communications, RCA Global Communications, Western Union International, and TRT Telecommunications, but the Commission held that the proposals would make valuable services available to users for whom overseas data communications had been technically impossible or economically impractical. The Commission characterized the proposed services as "developmental" in that they would help define and stimulate the relatively untapped specialized market, would encourage innovation among the carriers offering similar types of services, and would provide the Commission with data valuable in developing long-term policies in that field. There would be no apparent adverse economic impact on the established carriers, and in any event, the Commission imposed strict reporting requirements on Graphnet and Telenet and promised to monitor developments in the market and to take corrective regulatory action if necessary. Graphnet Systems, Inc., 63 FCC 2d 402 (1977), reconsideration denied in pertinent

part, 67 FCC 2d 1020 (1978) (J.A. 1, 20). This Court has jurisdiction pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), and 28 U.S.C. 2342.

1. The Commission's Decision.

While the technology involved in this case is complex, it is sufficient to understand that Graphnet and Telenet are "value added" common carriers; i.e., they lease communications lines from other carriers, enhance the service available through the application of sophisticated computer technology and then sell the augmented service to the public. See generally Regulatory Policies Concerning Resale and Shared Use of Common Services and Facilities, 47 FCC 2d 644 (1974); Resale and Shared Use of Common Carrier Services, 60 FCC 2d 261 (1976), reconsidered, 62 FCC 2d 588 (1977), aff'd sub nom. AT&T v. FCC, 572 F.2d 17 (2nd Cir. 1978), petitions for certiorari pending sub nom. IBM v. FCC, No. 77-1540 (filed April 26, 1978).

Specifically here, a predominant feature of Graphnet's proposed service is that it enables normally incompatible terminals to communicate. Thus, Graphnet customers can transmit information to distant facsimile machines from computers, teletypewriters, and data terminals as well as from other facsimile machines. See 63 FCC 2d at 405 n.4 (J.A. 4). One of Telenet's principle features is

a new technology known as "packet switching." Telenet's network subdivides each message from a customer into segments called "packets," routes each packet through whichever line is available at that instant, and reassembles the packets into completed messages at the destination, while also automatically detecting and correcting any errors which occur in transmitting, and performing speed and code conversion as required to enable otherwise incompatible computers and terminals to communicate. This results in more efficient, faster and cheaper communication. See 63 FCC 2d at 404 (J.A. 3).

Both Graphnet and Telenet were authorized to operate domestically in 1974. 63 FCC 2d at 405 n.4 (J.A. 4). In 1976 Graphnet and Telenet filed applications for overseas authority in response to a rapidly growing demand for such services that was not being met by the existing international carriers. Graphnet explained that its proposal "will extend to users seeking to communicate with overseas facsimile terminals a speed, reliability and flexibility of service not currently available." Application Attachment 3, pp.2-3 (J.A. 61-62). Similar advantages were detailed by Telenet. Application pp. 17-40 (J.A. 98-121).

Citing earlier findings in its Overseas Dataphone Decision, 57 FCC 2d 705 (1976), ^{1/} the Commission agreed that the number of facsimile and data terminals in the United States and abroad had increased dramatically and that further growth could be expected. 63 FCC 2d at 404-05 (J.A. 3-4). Moreover, the Commission observed, "[a]s an interdependency among the peoples of the various nations has increased, there has developed a substantial need for data communications services which would interconnect data terminals and computers on a worldwide basis in an effective and efficient manner." 63 FCC 2d at 405 (J.A. 4).

While the existing carriers were providing satisfactory service to large volume users, the Commission noted that their service was not cost-efficient for a substantial number of users with intermittent data communications requirements. Also, existing service generally did not make communication possible between incompatible terminals and computers. Therefore, the Commission concluded that "the public interest requires more and better service." 63 FCC 2d at 405-06. (J.A. 4-5). And because Graphnet and Telenet proposed to fulfill some of these essential communications requirements, their applications were granted. 63 FCC 2d at 406 (J.A. 5).

^{1/} Aff'd sub nom. ITT World Communications Inc. v. FCC, 555 F.2d 1125 (2d Cir. 1977).

The Commission made clear, however, that it was not announcing an "open entry" policy similar to that implemented in the domestic specialized common carrier field. Compare Specialized Common Carrier Services, 29 FCC 2d 870 (1971), reconsideration denied, 31 FCC 2d 1106, aff'd sub nom. Washington Util. & Transp. Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975). Rather, each future application must be justified on its own merits, as were those of Graphnet and Telenet. 63 FCC 2d at 407 (J.A. 6).

In making its public interest determination, the Commission rejected the established carriers' two principal objections.^{2/} First, they complained that Graphnet and Telenet had not obtained agreements from the foreign correspondents with whom interconnection at the European end would be necessary before service could be inaugurated. The Commission recognized, however, that the foreign correspondents would be likely to refuse to deal with Graphnet and Telenet until they had received official FCC approval of their proposed services. Therefore, the Commission temporarily waived the requirement for such agreements in advance, on the condition that service could not actually be commenced until such an agreement was obtained and had been reviewed by the FCC. In that manner, said the Commission,

^{2/} Other objections that have been abandoned on appeal will not be discussed. They are described at 63 FCC 2d at 409-10 (J.A. 8-9).

"our regulatory needs can be adequately satisfied." 63
FCC 2d at 408 (J.A. 7).

Secondly, the carriers complained that Graphnet and Telenet would enjoy a competitive advantage because they would be authorized to provide a unified domestic-overseas service, whereas Section 222 of the Communications Act restricts the international carriers to delivery and acceptance of domestic communications traffic only at specified "gateway" cities.^{3/} These restrictions do not apply to Graphnet and Telenet because by definition they are not "international record carriers": less than 50% of their revenues are derived from international traffic. See 47 U.S.C. 222(a)(3). Similarly, RCA Global argued that Graphnet and Telenet should be required to form separate corporations for their domestic and overseas operations, with prohibitions against interconnection of their respective services, just as was required of RCA Global prior to its entry into the domestic satellite market.

The objections were unpersuasive. Taking the last argument first, the Commission observed that RCA Global had been required to form separate corporations to ensure that its domestic operation would not be subsidized by its overseas revenues and to ensure that any losses

^{3/} Those "gateway" cities are New York, Washington, San Francisco, Miami, and New Orleans.

in its domestic sphere would not affect the viability of its overseas offerings. See RCA Global Communications, Inc., 56 FCC 2d 660 (1975). Graphnet and Telenet, on the other hand, were such small entities that these considerations were inapplicable. Because the carriers would have no significant revenue base, they would be unable to obtain any advantage over competitors notwithstanding their corporate unity. Just in case, however, the Commission required Graphnet and Telenet to keep accurate accounts of both domestic and international traffic and revenues so that the Commission would be alerted to any future need for the suggested corporate arrangement. 63 FCC 2d at 408 (J.A. 7).

The competitive disadvantage seen in Section 222 of the Act was likewise declared groundless. Indeed, the carriers failed to describe in any detail whatever the nature or degree of the disadvantage, nor did they offer any probative information demonstrating adverse economic impact. To the contrary, no competitive disadvantage seemed likely to the Commission in view of (1) the international carriers' freedom to interconnect with nonaffiliated domestic carriers, and (2) the international carriers' inherent advantages over Graphnet and Telenet by virtue of their established standing in the international field. "Thus, even under the restrictions dictated by Section 222 the international record carriers are provided sufficient flexibility to offer their services in an effective manner

and on a highly competitive basis" 63 FCC 2d at 409 (J.A. 8).

The Commission noted that any differences in regulatory treatment of the IRC's arose from restrictions imposed by Congress when it enacted Section 222. The Commission is presently studying proposals to expand the number of gateways, and it intends to expedite that proceeding.^{4/} But the Commission made clear that the Graphnet and Telenet authorizations are in no way dependent on the outcome of the gateway proceeding:

We cannot refuse to authorize services which would clearly benefit the public merely because a potential competitor might arguably be restricted in the nature of his competitive response by provisions of the Act which Congress, in its judgment, has seen fit to impose on certain entities. 63 FCC 2d at 409 (J.A. 8).

In overruling the objections and granting the applications, the Commission was careful to articulate the underlying policy considerations. Under Section 1 of the Communications Act, 47 U.S.C. 151, the Commission is obligated to make available to the people of the United States "a rapid, efficient, Nation-wide, and world-wide wire

^{4/} To the extent that the IRC's complain of restrictions on their own operations, their forum for making that complaint is the gateways proceedings, Docket 19660. See Notice of Inquiry and Proposed Rulemaking, 38 FCC 2d 543 (1972). See also Notice of Inquiry and Further Notice of Proposed Rulemaking in Docket 19660, FCC 78-511 (July 28, 1978) attached hereto as Addendum A.

and radio communication service with adequate facilities at reasonable charges." Mindful that developing computer technology can be expected to create new usages for overseas data communications services and new transmission techniques, the Commission believed that its statutory obligation could be fulfilled only by keeping abreast of these developments. Toward that end, the Commission authorized Graphnet's and Telenet's new services, as well as others proposed by RCA Global and Western Union International, ^{5/} on an experimental and developmental basis.

Our decision to grant the instant applications and to allow the entry of these four qualified applicants into the developing field of overseas data communications will make available to the public a variety of service offerings. Through continuing supervision and evaluation of the service offerings, we can more fully ascertain the exact contours of the public benefit in the provision of these services, and, where appropriate, delineate future policy concerning these overseas data communications services. Moreover, our ongoing evaluation will provide a factual basis for the consideration of future applications. 63 FCC 2d at 407 (J.A. 6). ^{6/}

^{5/} The applications of RCA Global and Western Union International were also granted in the Order under review, but they are not relevant to the issues herein and will not be discussed further.

^{6/} Graphnet and Telenet must submit on a quarterly basis the following information: (1) a detailed description of services rendered, (2) the number and type of customers served, (3) the number and type of communications actually carried on a country-by-country basis, (4) an accounting of all costs and revenues involved in the provision of the overseas service and (5) an accounting of all costs and revenues involved in the provision of the domestic service. 63 FCC 2d at 411 (J.A. 10).

2. Denial of Reconsideration.

Only RCA Global petitioned for reconsideration,^{7/} resurrecting its arguments that the grants of authority to Graphnet and Telenet without the imposition of gateway restrictions constituted an unexplained departure from international telecommunications policy, that the Commission failed to give adequate consideration to the adverse impact that the authorizations will have on the international market, and that the Commission violated established policy in waiving the requirement that Graphnet and Telenet obtain operating agreements in advance from the foreign administrations.^{8/} Petition for Partial Reconsideration (J.A. 669).

Before responding directly to RCA Global's contentions, the Commission set forth its understanding of the prevailing judicial and statutory standard:

The Commission may not grant authorization for [new] facilities just to create competition for its own sake. However, the Supreme Court has held that it is permissible for the Commission to grant

^{7/} ITT World Communications instead filed its appeal with this Court, Case No. 77-4028, which was later consolidated with that of RCA Global after the Commission denied in pertinent part its petition for reconsideration. Case No. 78-4047. TRT Telecommunications filed "Comments" on RCA Global's Petition, but because it was in reality a late-filed petition for reconsideration, it was dismissed as untimely. Nonetheless, the Commission considered the substantive issues raised. 67 FCC 2d at 1021 n.1 (J.A. 21).

^{8/} Other issues that have been abandoned on appeal will not be discussed. They are described at paragraphs 51-54 and 57-59 of the decision on reconsideration. 67 FCC at 1038-41 (J.A. 40-43).

such authorizations whenever it can warrant that competition will be in the public interest. FCC v. RCA Communications Inc., supra. 67 FCC 2d at 1029 (J.A. 30).

The Commission then recited the factors it believed justified its prior determination that "competition will be in the public interest."

First, it reiterated the indisputable fact that the international market for sophisticated communications services is rapidly growing. This finding was based on independent studies as described in the Overseas Dataphone Decision, 57 FCC 2d 705,^{9/} and on the comments filed in support of the Telenet and Graphnet applications by users who expressed a need for the special features of the proposed services. Indeed, as the Commission observed, "[t]he finding of public need for additional service is not controverted by RCA." 67 FCC 2d at 1029-30 (J.A. 30-31, 44B).

Specifically with respect to the Graphnet proposal, the Commission found that many of its facsimile service features that are in demand are not currently offered by the international carriers. 67 FCC 2d at 1039 (J.A. 31). Likewise, the packet-switched network of Telenet permits a highly efficient use of the communications facilities that

^{9/} See ITT World Comm., Inc. v. FCC, 555 F.2d at 1126 ("nearly all concerned agreed that there was an unsatisfied demand for international dataphone service").

will result in large reductions in cost over other systems. Said the Commission, "[t]his will permit small and medium users to engage in data communications on a more cost-efficient basis than is currently available." 67 FCC 2d at 1030-31 (J.A. 32).

Summarizing the public interest elements inherent in the authorizations, the Commission said:

The Commission's Decision can thus be described as, first, the recognition of an unmet public need; and, second, an attempt to meet that need through the authorization, and continuing evaluation of, a variety of different service offerings. 67 FCC 2d at 1032 (J.A. 33).

The Commission then turned to each of RCA Global's objections.

First, RCA Global again insisted that the grants to Graphnet and Telenet, when considered in conjunction with other authorizations, signal an extension of the domestic "open-entry" policy into the international sphere. 67 FCC 2d at 1022, 1032 (J.A. 22, 33). Therefore, said RCA Global, the authorizations should have arisen from a broad rulemaking inquiry rather than an ad hoc adjudication. 67 FCC 2d at 1033 (J.A. 35).

The Commission replied, as it had in its earlier Decision, that RCA Global was simply incorrect in its belief. Whereas domestically the FCC has established a presumption that the entry of new carriers into the

specialized communications market will serve the public interest, Specialized Common Carrier Decision, 29 FCC 2d 870, the authorizations granted to Graphnet and Telenet do not establish a general policy favoring competition in the international market. 67 FCC 2d at 1032-33 (J.A. 34). See also 63 FCC 2d at 407 (J.A. 6). To the contrary, the Commission said, it will authorize additional competition on an ad hoc basis where it can specifically be found to serve the public interest; and petitioners will have an opportunity to show that proposed authorizations, either singly or in combination with preexisting grants, will have a significantly adverse impact. 67 FCC 2d at 1033 (J.A. 34-35).

Because RCA Global's premise of major policy shift failed, its contention regarding the need for a rule-making likewise failed. And as the Commission noted, "there is no requirement that a general rulemaking precede consideration of license applications." 67 FCC 2d at 1033 (J.A. 35). Here, the decision to proceed by adjudication afforded the parties an opportunity to present evidence of adverse impact from these specific applications, which they failed to do, and would most expeditiously bring to the public the benefits of Graphnet's and Telenet's service. Moreover, by imposing regular reporting requirements on the carriers, the Commission said it could develop the information it needed to mold future policy, based on actual market

experience, without the delay and speculative data that attend rulemaking proceedings. 67 FCC 2d at 1034 (J.A. 35-36).

The Commission then turned to the allegation that the existing carriers would suffer a seriously adverse economic impact from Graphnet's and Telenet's entry, and that the new carriers would enjoy an unfair competitive advantage by virtue of their unified corporate structure. The first fear was found to be no more than bald speculation. Because of the significant differences in functional and economic characteristics between the Graphnet and Telenet services and the offerings of the established carriers (leased channel, Datel, telex, and telegram), the Commission concluded that there would be little cross-elasticity or market fragmentation and hence little appreciable economic impact. 67 FCC 2d at 1035-36 (J.A. 37-38).^{10/}

Answering the second fear, the Commission reiterated that the international carriers are free to interconnect with nonaffiliated domestic carriers and will thereby be able to compete effectively with Graphnet and Telenet for traffic originating in non-gateway cities. From the customer's point of view, said the Commission, it makes no

^{10/} The Commission also made clear that its impact focuses on the ability of existing carriers to continue providing needed service to the public -- not on revenue losses to those carriers per se. 67 FCC 2d at 1035 (J.A. 37).

difference if the carrier can provide a "through" service on its own facilities, or if an interconnected carrier must carry the message part of the way. The selected carrier is still a single source for the customer's international and domestic communications needs. No competitive disadvantage was apparent, and RCA Global failed to provide any probative evidence of public detriment. In any event, said the Commission, the new services will be subject to continuing review, and appropriate restrictions will be implemented if necessary. 67 FCC 2d at 1037-38 (J.A. 39-40).

Finally, the Commission again dealt briefly with the complaint that foreign operating agreements are a condition precedent to grants of overseas authorization. The Commission acknowledged the importance of reviewing the terms and conditions of such agreements, but affirmed that the public interest judgments can be made just as effectively prior to institution of service as prior to authorization. When the agreements are finally submitted, said the Commission, there will be notice to the public and opportunity to comment. The public will thus be amply protected, it said, and moreover, there is substantial

precedent for such conditional authorizations. ^{11/} 67 FCC 2d
at 1039-40 & n.28 (J.A. 41-42).

Accordingly, the petition for reconsideration
was denied, and these appeals followed.

^{11/} Graphnet & Telenet have not yet obtained agreements
with the foreign correspondents, and thus have not yet
begun international operations.

ARGUMENT

In the Orders under review, the Commission has responded to its statutory mandate to make available to the people of the United States an efficient, world-wide electronic communications service with adequate facilities at reasonable charges. Section 1 of the Communications Act, 47 U.S.C. 151. Through its grants of authority to Graphnet and Telenet, it has taken a modest and prudent step reasonably designed (1) to help satisfy an evident need for more, better and less expensive data communications service, (2) to stimulate innovation among carriers providing similar services, and (3) to develop actual market experience and information that will be extremely useful in the formulation of long-range policy. No evidence of probable adverse impact on the existing carriers and customers militated against the grants, but out of an abundance of caution the Commission imposed strict reporting requirements on the new entrants, thereby enabling the Commission to monitor any significant effects or trends that would necessitate a regulatory response. Thus, because the Commission's decision comports with all applicable statutory and judicial standards, its Orders should be affirmed.

I. THE GRANT OF AUTHORITY TO GRAPHNET AND TELENET TO HELP SATISFY AN UNMET PUBLIC NEED, SUBJECT TO CONTINUAL COMMISSION MONITORING AND THE POSSIBILITY OF APPROPRIATE MODIFICATION, WAS NOT AN ABUSE OF THE AGENCY'S BROAD DISCRETION.

The essential principles governing the authorizations here are contained in Section 214 of the Communications Act, 47 U.S.C. 214, as construed by the Courts in FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) and Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974). Section 214 instructs the Commission to grant the authorization if it finds on the basis of the services proposed that the new facilities will serve the public convenience and necessity.^{12/} In making that finding, the Commission must not equate competition with the public interest merely because competition is reasonably feasible; rather, "the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it." FCC v. RCA Communications, Inc., 346 U.S. at 96-97. And, it must go beyond a "bare assertion" of

^{12/} 47 U.S.C. 214 states in pertinent part:

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line.

benefit. "It must provide the basic facts which lead it to reach its conclusion of public benefit. . . ."

Hawaiian Telephone Co. v. FCC, 498 F.2d at 77.

The "basic facts" are undisputed. First, the Commission explained, in great detail, the technical and economic deficiencies in the existing services and, therefore, the existence of an unmet public need. 63 FCC 2d at 405-06 (J.A. 4-5); 67 FCC 2d at 1029-30 (J.A. 30-31). Next, it explained why grants to Graphnet and Telenet would yield multiple benefits: (1) the capability and expertise of the two carriers would be extended to the international data communications market to help fill that service void, (2) the new entrants would stimulate innovation and demand, and (3) through ongoing supervision and evaluation of the service offerings, the Commission could better ascertain the public benefits of those new services and formulate future policy governing those services in an international context. 63 FCC 2d at 407 (J.A. 6); 67 FCC 2d at 1030-32 (J.A. 31-33).^{13/}

This well-documented, paramount public interest finding that the grants to Graphnet and Telenet would yield valuable service and information must be the starting point

^{13/} For a more detailed description of the service offerings of Graphnet and Telenet, and the unmet need those offerings would help satisfy, see Graphnet Application Attachment 3, pp. 2-3 (J.A. 61-62); Telenet Application, pp. 17-40 (J.A. 98-121). See also customer demands excerpted in Telenet's Opposition to Petition to Deny, pp. 37-41 (J.A. 312-16).

in the analysis of petitioners' various arguments. Unless the weight of petitioners' arguments totally and indisputably negates those benefits, the Commission's decision to overrule their complaints is entitled to judicial deference and may not be set aside. SEC v. Chenery, 332 U.S. 194, 209 (1947); Coastal Bend TV Co. v. FCC, 234 F.2d 686, 690 (D.C. Cir. 1956). Here, a brief examination of the record demonstrates that petitioners' allegations do not even diminish, let alone outweigh, the benefits.

A. Petitioner's Have Failed to Rebut the Principal Commission Finding that the Grants to Graphnet and Telenet Would Satisfy Important Public Needs.

RCA Global does not dispute the basic finding that the grants to Graphnet and Telenet were responsive to important public needs. 67 FCC 2d at 1030 (J.A. 31). Instead, it musters a post hoc, collateral argument that no public interest is being served because the new entrants have yet to obtain foreign operating agreements (Br. 41), and the Commission failed to consider the alternative possibility of requiring Graphnet and Telenet to interconnect their services with the international carriers. (Br. 37-38, 41). But the Commission properly confined itself to the record as presented and refused to engage in useless conjecture. Whether the established carriers could satisfy the demand through interconnection with Graphnet and Telenet was never an issue below; only the net benefits to be gained by

authorizing Graphnet's and Telenet's entry into the international market were under consideration.^{14/} In any event, the ability of the existing carriers to meet the demand is irrelevant if, as here, the Commission can "warrant" that competition can be expected to have some beneficial effect, such as stimulating innovation and demand and providing valuable market experience data. See Washington Utilities & Trans. Comm. v. FCC, 513 F.2d at 1157-59; American Tel. & Tel. v. FCC, 539 F.2d 767, 771-74 (D.C. Cir. 1976); Pocket Phone Broadcast Service v. FCC, 538 F.2d 447, 451 (D.C. Cir. 1976).

Similarly, at the time of the Commission's deliberations, the absence of prior agreements from the foreign correspondents seemed understandable and more importantly was of no immediate consequence since commencement of service was conditioned upon acquisition and public and FCC review of the agreements. As the Commission observed, authorizations conditioned on receipt of satisfactory operating agreements have been granted in the past. See, e.g., TRT Telecommunications, Corp., 46 FCC 2d 1042 (1974); AT&T, 18 FCC 2d 402 (1969); Communications Satellite Corp., 1 FCC 2d 82 (1965). Thus, neither of these arguments warrants denial of the applications.

^{14/} Arguments raised for the first time on appeal are not properly before the Court. See 47 U.S.C. 405. See also cases cited at page 31 ante.

B. The Commission's Finding that the Grants to Graphnet and Telenet would not Have a Significantly Adverse Impact is Supported by Substantial Record Evidence.

The essence of RCA Globcom's appeal is that the authorizations to Graphnet and Telenet have radically altered the international data communications industry, a step that should have been undertaken only after formal rule-making proceedings. Moreover, it says, the grants will have dire economic consequences for the existing carriers, possibly forcing them to cut back on service to developing countries. (Br. 44-51). Precisely -- or even roughly -- how this will occur is never made clear.

First, the Commission could not have been more emphatic in its denial of the claim that it was implementing an "open entry" policy, an international counterpart to the domestic policy announced in its Specialized Common Carrier Decision, 29 FCC 2d 870. Repeatedly, the Commission disclaimed generally favorable assumptions or findings regarding the benefits and feasibility of competition here. 67 FCC 2d at 1032-34 (J.A. 33-36). Rather, the Commission found only that there would be no apparent adverse impact occasioned by the specific carriers providing the specific services on the specific routes, and nothing more. No additional authorizations were promised, and the economic implications of any such applications will be carefully reviewed in appropriate proceedings. Id.

Thus, the Commission conducted merely a discrete certification proceeding. Its decision to engage in ad hoc adjudication, by which it could gather useful data borne of actual market experience, rather than to proceed by rule-making, was not an abuse of discretion.^{15/} N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 293-95 (1974); SEC v. Chenery Corp., 332 U.S. 194, 202-03. See also Network Project v. FCC, 511 F.2d 786, 796-97 (D.C. Cir. 1975) (it was not an abuse of discretion to grant an experimental application without a hearing, where the results would be carefully monitored and evaluated.)

Nevertheless, RCA Global insists that the Commission ignored the broader ramifications of traffic diversion, market fragmentation, and unfair competition. (Br. 46-51). But much of petitioners' complaint of "unfairness" is not properly directed to the Orders under review. In arguing that they are suffering discriminatory regulation in being

^{15/} Ironically, the Commission's use of rulemaking to adopt the specialized common carrier policy was attacked as procedurally defective, on grounds that the agency was obliged to adjudicate each application in a hearing addressed narrowly to the services and routes proposed in the application. On review, the Commission's procedures were affirmed as proceeding from a proper exercise of the agency's discretion. Washington Util. & Transp. Comm. v. FCC, supra, 513 F.2d 1142; Bell Tel. Co. of Penn. v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026, reh. denied, 423 U.S. 886 (1975). See also, Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council, ____ U.S. ____, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978).

confined to the gateway cities and in being unable to interconnect with their corporate affiliates (ITT Brief at 28, RCA Brief at 46), they are challenging the Commission's failure thus far to remove those restriction as proposed in Docket 19660. See Notice of Inquiry and Proposed Rule-making, 38 FCC 2d 543 (1972). However, as the Commission correctly observed, the outcome of Docket 19660 is totally irrelevant to the Graphnet and Telenet applications, and there was no reason to defer the benefits to be derived from the Graphnet and Telenet offerings pending the outcome of that unrelated rulemaking proceeding. 63 FCC 2d at 409 (J.A. 8). Moreover, in pressing their "unfairness" arguments, the petitioners seem to be elevating their private equities over the more pertinent considerations of public benefit, a regulatory attitude inappropriate for the Commission. Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974): "[E]qualizing competition among competitors. . . is not the objective or role assigned by law to the Federal Communications Commission." (Emphasis in original.)^{16/}

^{16/} The Commission only recently has expedited its "gateways" inquiry in Docket 19660, FCC 78-511 at p. 7 (July 28, 1978), attached hereto as Addendum A. If the international carriers are dissatisfied with the result of that proceeding and are able to find error, they have every right to seek review and present their argument of unfairness. The present petitions, however, do not properly place the international carriers' "gateways" grievances before this Court. The only issues ripe for review concern the lawfulness of the grants to Graphnet and Telenet.

With regard to adverse impact from traffic diversion and market fragmentation, the record is barren of probative evidence to support that claim. See, e.g., petitions to deny the applications, J.A. 196, 212, 220, 245, 251, 253, and petition for partial reconsideration, J.A. 669. Apparently recognizing this, RCA Global chides the Commission for demanding something more than bald speculation (Br. 47-48), as if the Commission routinely denies applications or sets them for hearing on such flimsy bases. If that were the case, existing carriers could forestall new competition for years merely by claiming harm in the most abstract manner. Where an applicant proposes new service that the FCC finds will satisfy an unmet public demand the Commission requires any competitor opposing the application to show offsetting harms that would cause grant of authorization in balance actually to disserve the public interest. See, e.g., Carroll Broadcasting Co. v. FCC, 258 F.2d 440 443 (D.C. Cir. 1958). As the District of Columbia Circuit said recently, "The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of de facto monopoly." MCI Telecommunications Corp. v. FCC, 561 F.2d 365, 380 (D.C. Cir.

1977), cert. denied, 434 U.S. 1040 (1978). The petitioners made no showing here that would warrant either a denial of authorization or a hearing.^{17/}

To the contrary, the Commission's finding stands un rebutted that the services to be offered by Graphnet and Telenet appeal to different customers than those attracted to the traditional service offerings of the international carriers. The functional and operational characteristics are inherently different, and there are significant cost differentials as well. 67 FCC 2d at 1035-36 (J.A. 37-38). At best, RCA Global claims some fungibility between the existing telex service and those to be provided by Graphnet and Telenet (Br. 48-49), but even that argument is undeveloped. No probable relationship is established between the alleged traffic diversion and RCA Global's economic viability or its continuing ability to provide necessary service to the

^{17/} Compare Graphnet Systems, Inc. 67 FCC 2d 1059, 1061 (1978), in which Graphnet applied for authority to provide a service that Western Union believes is tantamount to direct competition with its domestic telegraph monopoly. Western Union came forward with concrete financial projections demonstrating the impact the Graphnet proposal would have on its rates and service and on its ability to continue serving the public, and the Graphnet application was accordingly designated for hearing.

public. The Commission's finding that any economic impact would be minimal is fully consistent with the record and with the Commission's treatment of similar arguments in analogous cases.^{18/}

Similarly, RCA Global's complaint that Graphnet and Telenet will enjoy an unfair competitive advantage by virtue of their ability to provide a unified domestic-international service is not persuasive. Its only elaboration on this point is that an unfair advantage does not cease to be unfair when enjoyed by a small rather than large competitor (Br. 47). That statement is difficult to dispute, but it begs the question: RCA Global has failed to establish any competitive advantage at all.^{19/} When confronted by the

^{18/} See North Carolina Utilities Comm. v. FCC, 552 F.2d 1036 (4th Cir. 1977), cert. denied, U.S. (1978), in which the Court stated that "no general principle of administrative law forces all agencies to conduct exhaustive economic impact studies before taking action. Such a requirement would hamstring administration at every juncture of the policy making and implementation process." 552 F.2d at 1054. Instead, the Commission is entitled to make reasonable assumptions concerning probable impact based on its own experience and on available evidence. 552 F.2d at 1055-56.

^{19/} ITT Worldcom likewise argues that the Commission should have required Graphnet and Telenet to incorporate their domestic and international facilities separately. (Brief at 40 n.) The Commission correctly refused to require separate corporations because there was no reason to do so. Nothing in the record indicated any likelihood of adverse impact as a result of Graphnet's or Telenet's corporate unity or their provision of a "through" service. 67 FCC 2d at 1034-38 (J.A. 36-40). "Competitive equality," in the sterile, abstract sense used by the international carriers, is not sufficient justification for the regulatory response requested. Cf. Hawaiian Tel. Co. v. FCC, supra, 498 F.2d 771.

Commission's explanation that, from the customer's point of view, it makes no difference whether the message is handled by one carrier or by two interconnected carriers (see Counterstatement at 14), and that therefore interconnected service is commercially competitive, RCA Global simply retorts: "It plainly isn't" (Br. 47), citing the Commission's refusal to permit interconnection between the international carriers and their corporate affiliates. But that refusal is based on entirely different considerations than presented here.^{20/} The disadvantage and unfairness are not as "plain" as RCA Global suggests, and they certainly do not provide any basis for rejecting the public interest benefits to be gained by the grants to Graphnet and Telenet.^{21/}

^{20/} The advisability of permitting the international carriers to interconnect with their domestic corporate affiliates is among the issues to be resolved in Docket 19660, the gateways proceeding. To avoid prejudice to the outcome of that proceeding, the Commission has forbidden any such interconnection in the interim. See United States Transmission Systems, Inc., 48 FCC 2d 859, 862 (1974), reconsideration denied, 51 FCC 2d 207, 209 (1975). Graphnet and Telenet are not international carriers, and hence their domestic operation cannot influence the outcome of that rule-making.

^{21/} The Commission has specifically provided for waiver of the non-interconnection policy pending the outcome of Docket 19660 (see note 20 supra) if the carrier can demonstrate substantial hardship to itself or its customers. See RCA Global Communications, Inc., FCC 78-513 (August 1, 1978), attached hereto as Addendum C; United States Transmission Systems, Inc., 51 FCC 2d 207, 210 (1975).

Because the Commission has pledged to monitor developments resulting from the grants to Graphnet and Telenet, and to take responsive regulatory measures if found to be appropriate, there is no reason whatever to be swayed by the speculative fears of economic harm. Indeed, if the Commission had withheld the benefits offered by these new carriers, based on nothing more than the record presented in this case, it could justly be accused of an abuse of discretion.^{22/}

C. Section 222 of the Communications Act Does Not Bar the Service Proposed by Graphnet and Telenet.

It is clear that Section 222 does not restrict the operation of Graphnet and Telenet domestically to the gateway cities, because the statute refers only to "international"

^{22/} ITT Worldcom presents a variation of the "unfairness" argument, asserting that Section 222 of the Act does not necessarily confine international carriers to gateway cities. Therefore, it says, this section does not provide any justification for its unequal treatment, contrary to the Commission's explanation. (Br. 31). As explained at page 25, supra, this argument would be appropriate only in the gateway proceeding (Docket 1966). In the Order under review here, the Commission's discussion of Section 222 was pure dictum, merely explaining that any unevenness in its regulatory scheme did not stem from the Commission's grant of authority to Graphnet and Telenet, but from the act of Congress. 63 FCC 2d at 403 (J.A. 8). This reflects this Court's view that the Commission is not empowered to circumvent the statutory scheme by making its own equitable adjustments. American Tel. & Tel. v. FCC, 487 F.2d 864, 881 (2nd Cir. 1973). The Commission had presented the substantive policy and legal justification for its treatment of Graphnet and Telenet in the section of its opinion immediately preceding the discussion of Section 222. Because that justification fully satisfies the applicable standards of judicial review, ITT Worldcom's dispute with the cited discussion is irrelevant.

carriers, 47 U.S.C. 222(a)(5), and these carriers do not fit the definition. 47 U.S.C. 222(a)(3). None of the petitioners argues the contrary. However, TRT Telecommunications turns the argument around and asserts that Graphnet and Telenet, as domestic carriers, are forbidden by the statute to engage in overseas operations. (Br. 22-25).

This argument has two serious weaknesses. First, it was never presented to the FCC for its consideration, and this Court must therefore decline to review it in the first instance.^{23/} Section 405 of the Communications Act, 47 U.S.C. 405, provides in pertinent part:

The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review. . . relies on questions of fact or law upon which the Commission. . . has been afforded no opportunity to pass.

See also Gross v. FCC, 480 F.2d 1288, 1290-91 (2nd Cir. 1973); Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 155 (1946).

In any event, the argument is without merit, for it depends on a radical re-write of legislative history and intent. This Court has recently had the opportunity to

^{23/} TRT makes reference below only to the "Congressional policy inherent in Section 222" of forbidding the intermingling of domestic and international record services. Comments at p. 3 (J.A. 700). It's statutory construction argument is unique to this appeal.

discuss the origins of the statute. Western Union International, Inc., v. FCC, 544 F.2d 87, 90-91 (1976), cert. denied, ____ U.S. ____ (1977). There, this Court noted that Section 222 was enacted in 1943 to permit Western Union to merge with Postal Telegraph Cable Company, an event which would result in a monopoly in the provision of domestic telegraph service. To prevent Western Union from using its domestic monopoly to favor its own overseas cable operation at the expense of its competitors, Section 222 forced Western Union to divest its international telegraph operations. "This was the price paid by the company for the acquisition of a domestic monopoly over telegraph service." 544 F.2d at 93. Significantly, as this Court also noted, the statute by its terms deals with "permissive consolidations and mergers." 544 F.2d at 89. See also RCA Global Communications, Inc., 42 FCC 2d 774 (1973), in which the Commission specifically held that Section 222 is operative only if merger or consolidation is proposed. See also Domestic Communications-Satellite Corp., 34 FCC 2d 9, 49 (1972).

To abstract from this legislative history a broad prohibition against any international operation by any domestic carrier, with no congruency of underlying policy and with no consolidation or merger, is simple nonsense. Equally simple is the fact that if Congress wished to enact such a prohibition, it would have said so plainly. But TRT

can cite to no Congressional statement. In the absence of compelling evidence of error, the agency's interpretation of its own statute is entitled to controlling weight.

Udall v. Tallman, 380 U.S. 1 (1965); Committee for Open Media v. FCC, 533 F.2d 1 (D.C. Cir. 1976).^{24/}

^{24/} One miscellaneous argument deserves only marginal mention. ITT Worldcom devotes a major portion of its brief to refuting the necessity of protecting Graphnet and Telenet from competition, but it fails to cite this necessity as a basis for the Commission's decision. And clearly it was not. Consequently, again, the whole argument is irrelevant. As repeatedly stated within, the grants to Graphnet and Telenet were based solely on their proposals to provide needed service and the various net public benefits that would result. No gateway or corporate restrictions were imposed because there was no statutory, judicial, or policy reason to do so. "Protecting" the new entrants was never a consideration.

CONCLUSION

The record fully supports the conclusion that Graphnet's and Telenet's service would help satisfy burgeoning demand, would stimulate innovation and more demand, and would provide information useful in the development of long-range policy in the field. Particularly in view of the safeguards imposed, the absence of probable adverse impact, and the promise of continuing supervision and evaluation, the Commission's grant of the applications is well rooted in the public interest. Its Orders should be affirmed.

Respectfully submitted,

JOHN H. SHENEFIELD,
Assistant Attorney General

ROBERT J. NICHOLSON,
Attorney,

DANIEL J. CONWAY,
Attorney.

Department of Justice
Washington, D.C. 20530

ROBERT R. BRUCE,
General Counsel,

DANIEL M. ARMSTRONG,
Associate General Counsel,

GREGORY M. CHRISTOPHER,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

August 7, 1978

International Record Carrier's Scope of Operations in the Continental United States, including Possible Revisions to the Formula Prescribed under Section 222 of the Communications Act.

Docket No. 19660
RM-690

NOTICE OF INQUIRY AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 13, 1978

Released: July 28 , 1978

By the Commission:

INTRODUCTION

1. We have before us three petitions relating to the domestic handling of international record traffic. First, on January 19, 1976, The Western Union Telegraph Company (WU) filed an Application for Review of the Chief, Common Carrier Bureau's denial of WU's Motion to Defer the filing of comments concerning the new gateway aspect of our broad examination of the relationship between WU and the International Record Carriers (IRCs) initiated in Docket No. 19660. See Notice of Inquiry and Proposed Rulemaking in Docket No. 19660, 38 F.C.C. 2d 543 (1972). WU's application is opposed by ITT World Communications Inc. (ITT Worldcom) and RCA Global Communications, Inc. (RCA Globcom). 1/ TRT Telecommunications Corporation (TRT) and Western Union International, Inc. (WUI) have filed comments. Second, WU has filed a motion to compel the production of evidence. ITT Worldcom, RCA Globcom and WUI have filed oppositions to that motion and TRT has submitted comments. WU has replied. Finally, RCA Globcom filed a Petition on August 19, 1977, requesting, inter alia, that we revisit our free direct access decision, and asking that

1/ ITT Worldcom, RCA Globcom and WUI filed late pleadings. Since WU has stated that it would not oppose consideration of these pleadings and we find that the public interest will be served by considering them, they shall be included in our consideration of this matter.

said petition be viewed as an application under Section 222(a) (5) for authorization to file tariff revisions offering free direct access. 2/

2. Under the provisions of Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. Section 222, and various Commission rulings thereunder, the International Record Carriers (IRCs) are only permitted to pickup and deliver incoming or outgoing international message telegrams in certain "gateway" cities within the continental United States. International messages to or from the "hinterland" 3/ are delivered by Western Union with the sender paying a single international message telegraph charge which is divided between the IRC and Western Union in accordance with a predetermined agreement. If the sender or recipient elects not to utilize Western Union's services, it must bear the transmission cost between the gateway city and the hinterland point in addition to the regular charges applicable to international message telegraph service.

ADDITIONAL GATEWAYS

3. By Further Notice of Inquiry and Proposed Rule-making in Docket No. 19660, 54 F.C.C. 2d 532 (1975), we invited interested parties to file comments with respect to requests by the IRCs that we approve, pursuant to Section 222 of the Act, additional specified points as international gateways, and that we find, pursuant to Section 214 of the Act, that provision by the IRCs of their record services at the proposed gateways would serve the public interest, convenience and necessity. We recognized therein that technological and service advances and the historical development of the international record industry combined to constitute strong evidence that additional gateway cities would serve the public interest. Nevertheless, we expressed our concern that the authorization of operations by the IRCs in new gateways

2/ We have disposed of the remainder of RCA's Petition in our Memorandum Opinion and Order, adopted _____, 1978, in File No. RM-2960.

3/ The "hinterland" is that territory in the contiguous 48 states beyond the limits of the gateways of an IRC.

might have a substantial adverse impact on WU's ability to provide its services to the public. 4/ Accordingly, before taking final action concerning the pending applications for operations of new gateways, we called upon interested parties, particularly WU and the IRCs, to provide us with information to measure the impact of additional gateways upon WU's provision of services to the public. 5/

4. Following the release of our Further Notice, WU filed a motion to defer the scheduled comment period until the IRCs updated the pending gateway applications and came forward with customer and city traffic and revenue data relating to potential diversion of WU's traffic. WU also asked that we defer the filing of comments until disposition of a complaint and petition for investigation it had filed concerning the IRCs' rate structure. See Interface of International Telex Service with the Domestic Telex and TWX Services in Docket No. 21005, 62 FCC 2d 414 (1976). In addition, WU in its motion to compel the production of evidence requested

4/ We note that a similar question is also before us in Graphnet Systems, Inc.'s (Graphnet) application for authority to provide communications services between the gateway locations of IRCs and Graphnet subscribers located in the hinterland. See Memorandum Opinion and Order and Notice of Inquiry and Proposed Rulemaking, in CC Docket No. 78-96, adopted March 9, 1978. Thus, any decision reached in Docket No. 19660 may have an effect on CC Docket No. 78-96.

5/ At present, the IRCs through the various applications are requesting to establish operations at:

Atlanta, Ga.	Hicksville, N.Y.	New York, N.Y.
Baltimore, Md.	Houston, Texas	Philadelphia, Pa.
Boston, Mass.	Los Angeles, Ca.	Pittsburgh, Pa.
Chicago, Ill.	Memphis, Tenn.	San Francisco, Ca.
Cincinnati, Ohio	Miami, Fla.	Seattle, Wash.
Cleveland, Ohio	Milwaukee, Wisc.	Stamford, Conn.
Dallas, Texas	Minneapolis, Minn.	St. Louis, Mo.
Denver, Colo.	Newark, N. J.	Washington, D.C.
Detroit, Mich.	New Orleans, La.	

These applications and opposition pleadings are described in International Record Carriers' Communications, 54 F.C.C. 2d 909 (1975). We also have pending applications, File No. 2209-C4-P-72 and 2164-C4-P-72 filed by Radiocall, Inc. for proposed radio services between Los Angeles and Honolulu, Hawaii.

us to require the IRCs to produce the same traffic and revenue information at issue in its motion to defer. In each instance, WU argued that this data should be made available to it since it maintained no precise records of international traffic sent by way of its network. Without evaluating billing information held by the IRCs, WU argued that it could provide no useful estimate of potential city by city and customer by customer traffic and revenue diversion. With respect to the pending applications, filed between 1971 and 1975, WU stated that information supporting the applications was stale and might no longer reflect the intentions of the IRCs. Moreover, WU argued the applications did not contain the complete information required by Section 63.01 of the Commission's Rules, 47 C.F.R. 63.01. Without complete and updated applications, WU contended that it had no realistic basis to determine the scope of the IRCs' proposed operations. With respect to its pending complaint concerning the alleged unlawfulness of IRCs' rate structure, WU contended that until resolution of that issue, it could not fashion a competitive response to the new gateway operations nor could it make a determination in this proceeding of the revenues it might lose to the IRCs.

5. After considering WU's arguments, the Common Carrier Bureau denied the motion to defer. It found (1) that no useful purpose would be served by requiring the updating and completion of the applications for new gateways until we determined the threshold question of whether approval of any new gateway cities would serve the public interest; (2) that the data WU requested would be more appropriately considered with the supplemental applications; (3) that delaying the new gateway inquiry to await resolution of WU's complaint was inappropriate. While the Bureau stated that it expected the IRCs to file complete factual information concerning traffic and revenue diversion, it cautioned that the various interested parties might later be called upon to provide additional information.

6. In its application for review, WU reiterates its contentions that the filing of comments should be deferred and, in addition, asks that we specify the precise issues the parties are to address. WU states that in determining whether the public interest will be served by approval of new gateway cities, we must consider whether approval of the proposed new gateways would (1) result in improved communications services to the public; (2) be economically viable; (3) result in significant diversion of revenues from existing carriers and, if so, the extent of the impact of such diversion upon existing services; and, finally (4) burden the public with higher costs of service. According to WU, approval of new gateway cities cannot properly be considered apart from

the specific applications requesting operational authority at those points. WU points out that no reason exists to separate questions concerning impact on its services from our review of the pending applications. By not requiring the completion and updating of the applications now, WU contends that we would deprive it of information essential to the record in this proceeding and unnecessarily prolong disposition of the applications. Similarly, WU takes issue with the Bureau's decision not to call upon the IRCs to provide revenue and traffic information of the proposed gateways, but, instead, to reserve judgment and, if necessary, later call upon the parties to provide supplemental information. WU states that it can determine the precise extent of diversion only by combining its own and the IRCs' information concerning international and domestic telex and record traffic. Finally, WU asks that we reverse the Bureau's decision to go forward with this proceeding without awaiting resolution of its complaint. WU again states that it cannot determine the impact of expanded gateway operations until we determine whether and to what extent the IRCs' rate structure should be modified.

7. ITT Worldcom and RCA Globcom argue that general rulemaking procedures are sufficient in the instant proceeding. Moreover, each points out that the IRCs would be willing, subject to certain conditions, to respond voluntarily to WU's request for traffic and billing data. With respect to the pending applications, RCA Globcom recognizes that each IRC has the burden to support its applications and for its part states that complete information will be forthcoming with its gateway comments. Both ITT Worldcom and RCA Globcom contend, however, that additional information, if necessary to the disposition of this proceeding, may be more efficiently and effectively acquired by specific Commission action after comments are exchanged rather than through the procedures WU requests. These parties also agree that to await the outcome of WU's complaint would delay resolution of the issues surrounding the approval of new gateways.

FREE DIRECT ACCESS

8. In All America Cable and Radio, Inc., 15 F.C.C. 2d 293 (1950), we held that it was permissible for hinterland customers to gain access to the IRCs directly by means of various domestic communications networks where the use of such media was at the option and expense of the customer. Subsequently, in our International Record Carriers decision, 40 F.C.C. 2d 1082 (1973) (free direct access decision) we rejected revisions to IRC tariffs which would have allowed the IRCs to absorb the cost of this direct access. We observed that

this would render the statutory differentiation between gateway and hinterland meaningless, and could have an economic impact on Western Union. We held that such a change could not be adequately evaluated in the tariff proceeding before us, and that if the IRCs wanted to pursue the free direct access question, they would have to file applications for authorization under Section 222 (a)(5). Since such an application is inter-related with the issues under consideration in Docket No. 19660, we indicated that they would be incorporated into that docket. ^{6/} Therefore, we are considering RCA Globcom's request in this docket.

9. The RCA Globcom petition notes that in 1975 WU received a major increase in domestic landline haul charges from the IRCs, which was absorbed by the carriers rather than passed through to the public. As a result of these increased payments to WU, RCA Globcom claims it has had to absorb over two million dollars a year. RCA Globcom further alleges that in 1976 it suffered losses of approximately \$4 million in the provision of international message telegram service. It would like to alleviate a portion of this loss by the initiation of free direct access, which would relieve RCA Globcom from continued exclusive reliance upon Western Union for the provision of international message telegram service to and from points in the hinterland, and allow hinterland customers access to RCA Globcom at no additional cost to the customers.

10. RCA Globcom asks that we revisit our free direct access decision and enable the IRCs to provide free direct access to the hinterland at the earliest opportunity. Such an action, RCA Globcom claims, would give it the opportunity to utilize cost-effective and efficient means to provide international telegram service to its customers. RCA Globcom also claims that continued restraints imposed on its ability to provide free direct access are unjust and unreasonable, and restrict the public in the use of a readily available operational alternative to transmit to or receive international message telegrams from the hinterland. This unreasonable restriction, according to RCA Globcom, effectively forecloses the public user in the hinterland from the option of dealing directly with an international carrier, and forces the customer to involve a third party, Western Union, in the transaction.

^{6/} 40 F.C.C. 2d at 1088. At the present time, the IRCs provide, in addition to other services, pickup and ~~delivery~~ of international telegraph messages, at their expense, within gateway cities.

DISCUSSION

11. Initially, with respect to WU's motion to compel, Section 1.311(a) of our Rules, 47 C.F.R. 1.311(a) states that discovery procedures, including a motion to compel the production of evidence, are available to a party only in a "case of adjudication which has been designated for hearing." In rulemakings, such as the instant proceeding, designated pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, discovery is not a matter of right. Instead, the use of discovery procedures is a matter within our discretion. Since we are disposing of the issues raised in WU's motion to compel in our action on its application for review, we find no reason to order discovery procedures at the present time. Accordingly, we will dismiss WU's motion to compel.

12. While we tentatively are of the view that an expeditious authorization of additional gateways could result in improving the responsiveness of the IRCs to specific customer needs and lead to more cost effective and efficient services, we find that WU's arguments concerning the adequacy of the pending applications are valid. Our review shows that, in some cases, information necessary for reviewing the subject applications has not been provided. Similarly, due to the lapse of time since ITT Worldcom's and RCA Globcom's applications were filed, the cost of the proposed operations and other data may differ significantly from that originally projected. We believe it is necessary to coordinate review of the potential impact of specific applications with possible action in this proceeding in order to establish an adequate record upon which to base our determination in both proceedings. In addition, considering the broad scope of the IRCs' request, we are of the opinion that certain traffic and revenue information requested by WU should be specifically included in the applications. We believe that this approach will result in the most expeditious processing of both Docket No. 19660 and the applications for specific gateways.

13. Therefore, we hereby grant WU's application for review to the extent that we shall require the IRCs to (1) file supplementary data including a city by city showing of outbound traffic and revenue data as set forth below, and (2) to complete their pending applications pursuant to Section 63.01 of the Rules. However, we deny WU's request to defer this proceeding pending the outcome of the proceedings looking toward a revision of the IRCs' rate structure. With the information we are now calling for, we believe we can sufficiently estimate the extent of potential diversion of traffic from WU's network.

While modification of the IRCs' rate structure might have some further effect on WU's revenues, we can later make any adjustment to preserve WU's ability to provide its basic services to the public if such adjustment is determined to be necessary and in the public interest.

14. Since the above revised procedures permit us to consolidate our actions relating to the proposed new gateways, we shall require those IRCs who have filed applications for new gateways to submit the following information concerning possible diversion of WU's traffic and revenues and the consequent possible impact on the public.

- (a) The location and boundary of each proposed gateway, i.e. whether authorization is sought to serve the public directly only within a particular city, within designated suburban points and within a particular city, within designated suburban points, or within a specified radius extending outside the city. Each radius is to be measured from the Central Post Office of the proposed gateway city.
- (b) The location of each proposed international switch, and an estimate of the number of channels for each service to be provided between each proposed gateway and each proposed international switching center.
- (c) A five year forecast of channel requirements for each service from each gateway and which also shows the number of forecasted messages and minutes respectively for message telegram and telex.
- (d) An economic justification for the proposed operations including a showing of estimated added revenues, costs and expenses, and the basis thereof. Detailed tables should set forth estimated revenue, investment and expenses separately at each proposed gateway for each proposed service. Revenue tables should include and set forth separately circuit, equipment and installation revenues. Investment tables should set forth multiplex equipment, IRUs, subscriber terminals, leased channel operating equipment and technical control

equipment. Expense tables should set forth separately charges for supervision, maintenance and installation, technicians, clerks and operators, messengers, office rental, telephone, utilities, sales, satellite tails, local loops and inter-office circuitry, depreciation, IRU maintenance and miscellaneous expenses.

- (e) Present total outbound international telex revenue from each gateway including any store and forward international telex revenue originated via WU telex or TWX.
- (f) Present total outbound revenues from cablegrams from each gateway automatically sent per customer agreements after unsuccessful attempts to complete an international telex connection originated via telex or TWX.
- (g) Present total outbound landline haul coefficient minutes associated with e and f.
- (h) Present total outbound cablegram revenue originated via WU telex and TWX and billed but not included in f.
- (i) Present total outbound minutes used in the WU telex network in connection with acceptance of traffic in h.

15. It should be emphasized that the IRCs should include a description of both the methodology used and the supporting data from which their forecasts and estimates were derived. We are not requiring the filing of data by the IRCs on an individual customer basis since review of city by city information will provide a sufficient record for our purposes. Moreover, we are not requiring specific information of WU since WU has a responsibility to provide whatever relevant data it has in its possession showing the extent of adverse impact it may incur by the advent of proposed operations in the proposed new gateways in response to the information supplied by the IRCs.

16. We shall also deny WU's request that we adopt its statement of issues, as described in paragraph 6 above. We believe that the comments solicited by our Further Notice, in conjunction with the specific traffic and revenue data requested in paragraph 14 above, will provide us with the proper foundation upon which to rest our decision in this matter. We believe our present framing of the issues is broad enough to compel the

parties to address the issues proposed by WU. However, we do not want to limit the parties to those specific issues. It is therefore unnecessary to specify any issues for comment in the additional gateways aspect of this docket, other than the general question raised in the Further Notice, 54 F.C.C. 2d at 534.

17. In regard to RCA Globcom's request that we revisit the free direct access decision and give it authority under Section 222(a)(5) to revise its tariff accordingly, we think it is necessary and timely to reevaluate the existing institutionalized methods and practices involved in the pickup and delivery of international traffic originating at or delivered to hinterland points outside of the established gateway cities, so that the public will be assured of efficient and economic international record communications. In our original decision, 40 F.C.C. 2d 1082 (1973), we did not make a determination on the merits of the free direct access proposal, but only found that the IRCs could not institute such a procedure through the simple filing of a tariff revision without first obtaining authority to do so under Section 222 (a)(5). We are therefore asking all interested parties to comment upon the merits of allowing an IRC to institute free direct access. It is possible that any offering of this type by the IRCs may have substantial adverse impact on Western Union's ability to serve the public. Accordingly, we expect the parties to address this issue directly, as well as the issue of what benefits will accrue to the public. Since Section 222 restricts the operation of the IRCs outside their established gateways, we also expect the parties to address the question of whether the free direct access proposals are within the scope of legally permissible activities for IRCs under Section 222.

18. In this Notice of Inquiry and Further Notice of Proposed Rulemaking, we are calling on the IRCs to gather and submit a substantial amount of information, in order that we may go forward with the existing and proposed rulemaking in Docket 19660. In addition, we note that the IRCs must also amend their pending applications for additional gateways to include the data required to be filed by Section 63.01 of the Commission's Rules and Regulations. Further, we expect that the IRCs may also wish to amend these applications in light of new economic developments since their original filing and the proposal to revisit free direct access. We believe that such a dual course of action will speed the entire process by enabling us to act on the applications in conjunction with this rulemaking in Docket 19660. We recognize that the information required in the rulemaking may, in some cases, be the same as that necessary to update and complete the carriers' pending applications. Accordingly, we will allow the inclusion of

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 78-512
95472

In the Matter of)
)
Restrictions on interconnection) File No. I-SP-2
between ITT World Communications)
Inc. and United States Transmission)
Systems, Inc.)

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1978

Released: August 1, 1978

By the Commission: Commissioner Fogarty dissenting and issuing a
statement.

1. Pending before the Commission is an Application filed jointly by ITT World Communications Inc. (ITTWC) and United States Transmission Systems, Inc. (USTS) for special authority to interconnect their respective systems to provide a continuous circuit of communications between a U.S. hinterland point and an overseas point. ITTWC is an international record carrier, while USTS is a domestic terrestrial specialized carrier. Both are controlled by the International Telephone and Telegraph Company. Public notice of the application was given on May 17, 1977.

2. The Commission has prohibited USTS and ITTWC from interconnecting for the provision of international service. ¹/ The prohibition was imposed because, in view of the common ownership of the two carriers, interconnection would effectively expand the number of cities in which ITTWC would operate beyond those cities designated as gateways pursuant to Section 222(a)(5) of the Communications Act of 1934, as amended. In imposing the prohibition, the Commission noted that a separate proceeding was underway to consider the expansion of gateway cities (Docket No. 19660), and concluded that any such expansion should be authorized only via that proceeding.

¹ / United States Transmission Systems, 48 F. C. C. 2d 859 (1974); reconsideration denied 51 F. C. C. 2d 207 (1975).

Therefore the prohibition on interconnection was imposed on the jointly-owned carriers, pending resolution of the other proceeding. 2/ The Commission did indicate, however, that it would "consider an application for special authorization in any given case where it can be shown that this prohibition would create an unreasonable hardship in a given situation." 3/

3. In support of their request the applicants argue as follows. They assert that in much of its service area USTS provides the sole alternative for private line service to the service provided by AT&T, and that the private line service provided by USTS is of at least as high a quality as that provided by AT&T and at rates generally below those of AT&T. Petitioners conclude that for this reason, the interconnection prohibition poses an unreasonable hardship on the user located in the hinterland. Further, they claim that the prohibition causes an unreasonable competitive disadvantage for USTS vis-a-vis other domestic carriers.

4. The applicants also point out that the prohibition was initially imposed by the Commission in an Order released on September 13, 1974 and that there has been no measurable progress toward action on the issues considered in Docket 19660 since that time. The applicants further argue that the prohibition imposes hardships on both carriers in that they cannot compete effectively with other carriers who are not similarly restricted. Finally, the applicants question the Commission's rationale that interconnection would in fact give ITTWC additional gateways. They state that "ITTWC does not believe that its position vis-a-vis USTS is any different than the relationship which it has with any other domestic carrier providing access for a hinterland customer from the customer's location to ITTWC's gateway operating center." 4/

5. RCA Global Communications, Inc. (RCAG) filed a statement in support of the request. It points out that it is also prohibited from interconnecting with its sister company, RCA American Communications, Inc., a domestic satellite carrier. RCAGC states that it expects that

2/ The Commission has imposed a similar prohibition on the interconnection of RCA Global Communications, Inc. and RCA American Communications, Inc.

3/ 51 F. C. C. 2d at 210.

4/ Application, p. 6.

any removal of the interconnection prohibition on the applicants would also apply to it. RCAG says that it is concerned that the prohibition, which it says was characterized as "only an interim measure" by the Commission when it was imposed, is in danger of becoming quite permanent through repeated use and citation as precedent. RCAG thus urges the Commission to remove the prohibition without waiting for the resolution of Docket 19660.

6. Oppositions to the application were filed by Western Union Telegraph Company, Western Union International, Inc., TRT Telecommunications Corporation and Graphnet Systems, Inc. These parties raise two main points. First, they question, on a procedural basis, the propriety of the request at the present time. They state that the issue raised by the request was previously decided by the Commission in the original authorization to USTS and was reviewed and upheld on reconsideration. Hence, they allege that the request is inappropriate in that it requests a further reconsideration of matters already decided and reviewed. They urge that there must be an end to litigation and that repetitive requests for the same authority are not allowed.

7. In addition, the parties opposing the request state that the applicants have not shown the existence of any hardship to anyone other than themselves. That hardship, they allege, was recognized by the Commission when it first imposed the prohibition. They argue that the fact that no customer has complained about the prohibition shows that it does not actually work a hardship on the public.

8. In reply to the opposition, the applicants deny that they are seeking further reconsideration of the interconnection prohibition. They state that their request is both more narrowly drawn in perspective and based upon wholly different considerations. By example, they note that their application is to permit a potential user of ITTWC's international services to access directly the services of ITTWC by obtaining its own private line circuit between its hinterland location and ITTWC's gateway operating center from USTS. The applicants go on to state that the Commission has specifically concluded that the general interconnection of international and domestic carriers, in which the domestic circuits are obtained by or on behalf of the hinterland users and are directly paid for by such users, does not constitute an expansion of an IRC's gateways. Thus the applicants assert that their request is limited to hinterland users

desiring to obtain private line circuits from USTS for the purpose of obtaining "Paid direct access" to ITTWC's international services.

9. Regarding the showing of hardship, the applicants merely assert that the opposing parties fail to refute the showings made in the application. They give no additional details of the alleged hardship.

10. ITTWC and USTS attempt to show in this application that continuance of the interconnection prohibition causes an unreasonable hardship on both potential customers and on themselves in their competitive arena. Theirs is not a petition for reconsideration of the previous Commission decisions addressing their interconnection. 5 / Therefore, the issue to be resolved is whether the applicants have met the burden of showing the existence of an unreasonable hardship in the particular case being considered.

11. The hardship complained of by the applicants is of two types; the one allegedly being suffered by hinterland users and the one claimed by the applicants in being unable to compete freely with other carriers. However, the applicants have failed to demonstrate any hardship whatsoever to any particular user resulting from the interconnection prohibition. The mere allegation of hardship without factual support is not sufficient.

5 / A petition for further reconsideration is clearly barred by the doctrine of administrative finality. "Further, there must be some finality to the administrative process; and absent extraordinary circumstances, the Commission's decision on petition for reconsideration exhausts a party's administrative remedies. If this were not the case, we would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion." Atlantic City Broadcasting Company, FCC 61-964, 21 R.R. 194a, cited with approval in Durfee's TV Cable Co. 11 F. C. C. 2d 979 (1968).

12. Applicants' claim of hardship for themselves is likewise insufficient. When it imposed the interconnection prohibition, the Commission was aware that it was restricting ITT Worldcom and USTS to some degree. The applicants have brought forward no new information to show any hardship that had not been anticipated by the Commission and was not considered by the applicants when the USTS conditioned grant was accepted. 6/ We find the request for waiver to be without merit.

13. Accordingly, the joint applicant of ITT World Communications, Inc. and United Transmission Systems, Inc. for permission to interconnect their systems to provide through international service to and from hinterland points IS DENIED.

*FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

6/ We also note that gateway issues are being examined in Docket No. 19660. By separate action taken today we have established a new pleading cycle in that proceeding. We point out also that included in that proceeding also is a revisitation of our "free direct access" decision which forbids International Record Carriers to pay for the direct part of international messages that originate or terminate in non-gateway cities. International Record Carriers, 40 FCC 21 1082 (1973). Our authorization of new domestic record carriers to enter certain international markets does not permit us to ignore the "gateway" restrictions that inhibit the domestic operations of international record carriers. See Graphnet Systems, Inc. 63 FCC 2d 402, 408-9 (1977), review pending sub nom. ITT World Communications, Inc. v. FCC, No. 77-4028, 2d Cir.

*/ See the attached dissenting statement of Commissioner Fogarty.

DISSENTING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Interconnection of U.S. Transmission Systems and ITT World Communications Inc.

It appears to me that Section 222(a)(5) of the Act can be read to permit interconnection between a domestic specialized carrier and an affiliated international record carrier for through private line data services. There can be no question that this aspect, and other aspects, of Section 222 are ambiguous. However, my reading would restrict the international record carriers to service to and from the gateway cities, without limitation as to interconnection with any domestic carriers. Therefore, I dissent.

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 78-513
95474

In the Matter of the Application of	)	
	)	
RCA Global Communications, Inc.	)	File No. I-SP-3
	)	
For waiver of condition prohibiting	)	
interconnection of its circuits with	)	
those of RCA American Communications,	)	
Inc. for the provision of international	)	
service, and other relief.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1978

Released: August 1, 1978

By the Commission: Commissioner Fogarty concurring in the result.

1. The Commission has under consideration a "Request for Waiver and for Other Relief", filed on June 24, 1977 by RCA Global Communications, Inc. (RCA Globcom). In this filing, RCA Globcom asks the Commission to issue a limited waiver, based on hardship, of its interim policy that currently prohibits RCA American Communications, Inc. (RCA Americom) from interconnecting with RCA Globcom for the provision of its international services to any point not an authorized RCA Globcom gateway city.^{1/} The waiver would permit the two RCA companies to interconnect international circuits terminating at the National Aeronautics and Space Administration (NASA) Goddard Space Flight Center (GSFC) in Greenbelt, Maryland, with RCA Globcom providing the international portion and RCA Americom the domestic link. In the alternative, RCA Globcom requests a ruling that GSFC is within the RCA Globcom Washington, D.C. gateway. In its reply comments RCA Globcom suggests the additional alternative of the designation of GSFC as a limited purpose gateway, for NASA communications. In either case, RCA Globcom would be legally permitted to accept and deliver international record communications at GSFC, whereas currently it must connect with a (non-affiliated) domestic carrier at a gateway city, pursuant to Section 222 (a)(5) of the Communications Act of 1934, as amended.

2. The Western Union Telegraph Company (WUT) and TRT Telecommunications Corporation (TRT) filed petitions to deny the RCA Globcom request.^{2/} RCA Americom and RCA Globcom filed in opposition to the petitions to deny,

^{1/} See RCA Global Communications, Inc., 56 F.C.C. 2d 660 (1975).

^{2/} TRT's pleading was filed one day after the end of the filing period for pleadings relating to this application and was accompanied by a petition to accept the late filed pleading. No party has objected to the grant of that petition, and TRT's petition to accept its late filed pleading IS GRANTED.

and WUT filed a reply to those oppositions.

3. In support of its request for waiver, RCA Globcom first attacks the Commission's rationale for initially imposing the prohibition. It states that it and RCA Americom, a commonly-owned domestic satellite carrier, are now prohibited from interconnecting for the provision of through international record traffic, pending Commission action on various requests to grant additional gateways to the international record carriers in Docket 19660. ^{3/} RCA Globcom takes issue with what it says is the premise behind the prohibition, that permitting interconnection could amount to a de facto grant of additional gateway authority. RCA Globcom asserts that since it and RCA Americom are separate corporations which act independently, there is no basis to assume that their interconnection would create a new gateway. RCA Globcom also says that it finds it difficult to see how a single waiver of the interconnection prohibition could be regarded as an expansion of its gateways.

4. As further grounds for requesting the limited waiver, RCA Globcom argues that the prohibition creates a hardship upon both NASA and itself. RCA Globcom notes that the Commission has stated that it would consider a waiver of an interconnection prohibition in any case where hardship could be shown, citing United States Transmission Systems, 51 F.C.C. 2d 207 (1975). Although it acknowledges that the Commission at that time was addressing the prohibition which it was applying to ITT World Communications, Inc. (ITT Worldcom) and United States Transmission Systems (USTS), RCA Globcom argues that the same policy should apply to consideration of its interconnection with RCA Americom.

5. The hardship falling upon NASA from the prohibition, according to RCA Globcom, is that NASA's choice of carriers is limited, which may force it to pay more for the service than it would pay if it could take service from both RCA carriers. RCA Globcom also sees a hardship upon itself in that it is prevented from fully competing with such entities as Telenet and Graphnet, who are authorized to serve international points without being subject to gateway restrictions. RCA Globcom also states that it is suffering a hardship in that it may lose substantial revenue as a result of the prohibition. It alleges that NASA plans to request up to 19 leased channel satellite circuits between GSFC and various international points, which will produce revenues totalling \$2.7 million per year. That amount is about 25% of its total government leased channel revenues in 1976, RCA Globcom states.

6. Addressing the separate corporation argument in its Petition to Deny, WUT argues that the reason the Commission ordered the creation of RCA

^{3/} "To be consistent with our previously enunciated policy, pending the resolution of Docket 19660, the RCA domestic satellite entrant shall not interconnect with RCA Globcom for the provision of RCA Globcom's international services to any point not currently an authorized RCA Globcom gateway city." RCA Global Communications, Inc., 56 FCC 2d at 672 (footnote omitted).

Americom, was solely to avoid the potential for cross-subsidization of competitive domestic communications by international rate payers; it had nothing to do with the gateway limitations of Section 222. Furthermore, the Commission imposed the interconnection prohibition at the very time that it directed the formation of the separate RCA companies. WUT says that it is thus obvious that the existence of separate corporations cannot be a reason for altering or removing an interconnection prohibition, especially one imposed simultaneously with the creation of the separate corporations.

7. Responding to the hardship argument, WUT asserts that no special circumstances have been shown with respect to service at GSFC to warrant a waiver. WUT says that the Commission was aware of the existence of a large amount of communications via GSFC when it imposed the prohibition, and it did not carve out an exception for NASA at that time. Also, WUT disputes the validity of the argument that NASA should have the widest available choice among carriers, and notes that this argument was rejected by the Chief, Common Carrier Bureau in an earlier RCA Americom request for permission to interconnect with RCA Globcom, File No. W-P-C-1082, released April 13, 1977.

8. TRT opposes the request for permission to interconnect, viewing it as an impermissible request for reconsideration of the prohibition, an action which it claims is barred by Section 1.110 of the Commission's Rules. Further TRT argues that whereas the Commission had said it would allow ITT Worldcom and USTS to apply for a waiver of their non-interconnection condition in case of hardship, no such opportunity was given to the RCA companies, and hence showing hardship is of no avail.

9. In its application, RCA Globcom suggests that, should the Commission deny its request to interconnect with RCA Americom, it include GSFC within the Washington, D.C. gateway. That action would allow RCA Globcom to accept and deliver international record traffic at GSFC. RCA Globcom makes the following showing in support of this alternative.

10. According to RCA Globcom, for a number of years a number of international record carriers have been accepting and delivering message telegram and telex traffic at federal government offices which are located outside of the boundaries of Washington, D.C. but within 10 miles of the carrier's Washington office. This arrangement has not been formally approved by the Commission, but resulted from an agreement among the IRC's and WUT. Tariffs specifying this service have been allowed to go into effect. 4/

4/ For a further discussion, see Press Wireless, Inc., 21 F.C.C. 511, 518 (1956).

RCA Globcom notes that on two occasions the Commission has authorized it to directly serve two government locations in Maryland which are more than 10 miles from its Washington office. 5/ In authorizing service to these points the Commission recognized that government offices were moving out of the city of Washington to suburban Maryland and Virginia, and found the public interest would be served if it were to allow the same carriers which had served these agencies while in Washington to continue to serve them after they had moved. RCA Globcom asserts that "NASA itself was formerly headquartered within the limits of Washington, D.C. before it moved to its present location." 6/

11. RCA Globcom states that GSFC is located only 12 miles from its Washington office, and argues that in view of the two precedents authorizing service beyond the 10 mile limit, it would be inequitable to apply a hypertechnical construction of the precedents to deny the RCA Globcom request.

12. In its opposition to this alternative request, WUT states that the 10-mile radius exemption to the Washington, D.C. gateway boundary resulted from a negotiated settlement of a controversy over the furnishing of tie-lines by the IRCs to customers located beyond the gateway cities. WUT notes that the Commission never formally approved that settlement but merely allowed it to go into effect. WUT argues that in attempting to use that settlement to justify a further enlargement of the Washington gateway, RCA Globcom is effectively reneging on its terms. WUT concludes that "the fact that the Washington gateway was defined by agreement of all interested carriers is a strong reason for the Commission to decline to alter that gateway pending its resolution of all pertinent gateway problems in Docket No. 19660." 7/

13. Regarding the service to locations beyond the 10-mile radius (Germantown and Cheltenham), which was referred to by RCA Globcom, WUT notes that RCA Globcom fails to cite a case or authority for either city, and concludes that neither is a precedent for a redefinition of the Washington gateway.

14. TRT does not oppose the inclusion of GSFC within the Washington gateway so long as it would apply to all carriers, not to only RCA Globcom. TRT asserts that there is nothing in the Communications Act, nor are there any public interest considerations, which would justify expanding the Washington gateway authority of only one carrier. RCA Globcom did not reply to this point in its responsive pleading.

5/ RCA Globcom appears to be referring to the following actions by the Commission: (1) In 1959, in File No. T-C-1281, the Commission authorized RCA Globcom to serve the U.S. Naval Communications Center in Cheltenham, Md., located approximately 16 miles from Washington, and (2) in 1961, in File No. T-C-1441, the Commission authorized it to serve the Atomic Energy Commission in Germantown, Md., approximately 22 miles from Washington.

6/ Application, Page 8

7/ Petition to Deny "Request for waiver and for other relief", filed by WUT August 4, 1977.

15. RCA Americom filed Comments in support of the RCA Globcom filing, in the form of a reply to the oppositions of WUT and TRT. RCA Americom proposes an alternative, which RCA Globcom adopts in its reply pleading, of the designation of GSFC as a limited purpose gateway. The RCA companies cited the designation of Stockton, California as a limited purpose gateway in American Satellite Corporation, 65 F.C.C. 2d 279 (1977), as a precedent for this action. According to RCA Globcom, the Commission designated Stockton, California as a limited purpose gateway, solely for "the provision of international AVD/SVD ^{8/} private line service via satellite relay to, and from, earth stations which are located on a customer's premises and dedicated solely to the use of that customer, and to no other customer or use." ^{9/} RCA Globcom claims that these considerations would likewise justify making GSFC a limited purpose gateway, as the domestic satellite facilities serving GSFC would be (or are) located on the customer's premises and dedicated to the use of that single customer. RCA Globcom further states that NASA has a continuing need for substantial international communications services and its "headquarters" at GSFC would be particularly appropriate for designation as a limited purpose gateway.

16. Responding to the limited purpose gateway proposal, WUT states that the American Satellite decision was a narrow holding and did not open the door for the creation of new gateways outside of Docket 19660. WUT observes that a major consideration in the designation of a limited purpose gateway is the proposed service configuration, which, it claims, is not described in the RCA Globcom request. WUT notes that in the American Satellite case, there was only one satellite hop, and in the present case, while RCA Globcom has not specified the particular routing it would use, the probable path from GSFC requires two hops, via a domestic satellite to an INTELSAT earth station then to an INTELSAT satellite. Furthermore, WUT recalls that RCA Globcom is barred from using the RCA Americom earth station at GSFC also citing the RCA Satellite Order, 56 F.C.C. 2d 660 (1975), and it questions the means RCA Globcom might use to carry the traffic to the INTELSAT earth station. WUT notes that there is no showing of plans for an INTELSAT earth station at GSFC, which is what would be required for a direct satellite link to overseas points.

Discussion

I. Request to interconnect

17. We find that RCA Globcom addresses two separate areas in its request to interconnect with RCA Americom. In challenging the Commission's rationale for initially imposing the interconnection prohibition, RCA Globcom is in effect seeking reconsideration of our RCA Satellite Order, cited in footnote 1 herein which imposed the prohibition. The time to request such reconsider-

^{8/} Alternate Voice Data/Simultaneous Voice Data

^{9/} American Satellite Corporation, supra, at 288

ation has long since passed, and we are aware of no circumstances which would justify a request for reconsideration at this time. The Rules which specify time periods within which a party may request reconsideration of a Commission decision have been adopted to promote administrative efficiency and to permit the public to rely upon the finality of Commission decisions. Exceptions to these limits are made only in rare cases where a party is able to demonstrate unusual circumstances requiring the exception. In this case, RCA Globcom has not even attempted to demonstrate any such circumstance. It has not, for example, presented us with new information or fresh arguments against the interconnection prohibition. We therefore decline to reconsider that earlier Order. Moreover, we have reviewed the reasons behind the order and they still appear valid to us.

18. The second area addressed by RCA Globcom is a request for a waiver of the interconnection prohibition based on a showing of hardship. Although in imposing the prohibition we did not explicitly state that we would consider an application by the RCA companies for waiver of the interconnection prohibition upon a showing of hardship, we fully intended to grant that privilege to them. We therefore shall consider the request for waiver on its merits.

19. We are unable to find that RCA Globcom has justified the grant of a waiver. It has attempted to show hardships both for itself and for NASA arising from the prohibition. However, the circumstances cited by RCA Globcom are general in nature, not relating specifically to hardships in providing service to or from GSFC. Its alleged inability to compete with other international carriers who are not restricted in their choice of domestic connecting carriers applies to all customers, not merely to NASA. We note that RCA Globcom has not demonstrated that it has in fact lost or will lose business because of the prohibition. It makes no showing that it could not service NASA through a carrier unaffiliated with the RCA corporate family. However, assuming arguendo, that it has in fact suffered to some degree, there is nothing in the record by which we can conclude that the overall public interest has been harmed, taking into account all those considerations which led us to impose the prohibition initially.

20. Similarly, we do not find that the prohibition imposes an unreasonable hardship on NASA. We note that since NASA has not participated in this proceeding we have no insight into NASA's views. Moreover, RCA Globcom has not presented any facts which were not in existence when we imposed the prohibition. Therefore, we find that RCA Globcom has not met its burden to show that a grant of its application for permission to interconnect with RCA American for international service to and from GSFC will alleviate a hardship, as described above, and will otherwise serve the public convenience and necessity. Accordingly we deny RCA Globcom's application for permission to interconnect.

II. Request to include GSFC within the Washington gateway

21. RCA Globcom makes the alternative request that we redefine the Washington gateway so as to include the GSFC. It is true, as mentioned in Paragraph 10 above that IRCs have been providing direct services to federal government installations located near but beyond the boundaries of Washington, D.C. for some time. This resulted from the settlement of a controversy between the IRCs and WUT, and applies only to message telegram and Telex services. At that time, WUT was in a position to make that agreement without jeopardizing the interests of any other carrier.

22. In the case at hand, RCA Globcom is asking for major changes in both the agreement among the carriers and in the Commission's definition of a gateway. Service by IRCs to installations located outside the limits of the District of Columbia was permitted on the basis of considerations of the national interest and recognition of the movement of agency offices to suburban areas. In the cases of both Germantown and Cheltenham, the offices had direct service from RCA Globcom before they moved from Washington, and the authorization did not provide RCA Globcom with new customers. In the present case, service to GSFC is not a continuation of service to a government office which has moved from Washington to Maryland. NASA Headquarters has always been and remains within Washington; the GSFC is one of its many centers which are located around the country. Authorization of an IRC to serve GSFC directly would bring about the initiation of service to a new customer, and does not represent merely the continuation of service to an existing customer who is moving from its present location.

23. We also note that, as Docket 19660 is considering the question of expanding the definition of gateways to include suburban areas, the relief requested by 10/ RCA Globcom is appropriately addressed within the context of that proceeding, absent compelling public interest considerations which would require us to make an exception. RCA Globcom has made no such showing; it has failed to even address the public interest considerations, arguing instead that its request should be granted because the mileage increase is small. We further find that the authorizations involving Germantown and Cheltenham were issued before the institution of Docket 19660, and cannot be construed as precedents for the expansion of gateway boundaries outside of that proceeding.

24. In conclusion, we find that RCA Globcom has not shown that the public interest will be served by adoption of its alternative request to include the GSFC within the Washington gateway. We are therefore denying the request of RCA Globcom.

10/ By separate order adopted today we have established a new pleading cycle in Docket No. 19660. Included in that proceeding also is a revisitation of our "free direct access" decision which forbids International Record Carriers to pay for the domestic part of international messages that originate or terminate in non-gateway cities. International Record Carriers, 10 FCC 2d 1082 (1973). Our authorization of new domestic record carriers to enter certain international markets does not permit us to ignore the "gateway" restrictions that inhibit the domestic operations of international record carriers. See Graphnet Systems, Inc. 63 FCC 2d 402, 408-9 (1977), review pending sub nom. ITT World Communications, Inc. v. FCC, No 77-4028, 2d Cir.

III. Request to designate GSFC as a limited purpose gateway

25. The final alternative suggested by RCA Globcom is the designation of GSFC as a limited purpose gateway for government communications. As conceded by RCA Globcom, this action would have the same effect as would extending the Washington gateway to include GSFC. Again, we are denying this request. The concept of a limited purpose gateway has been applied only to Stockton, California for communications terminating there and in Hawaii. In designating Stockton as a limited purpose gateway, we gave great weight to the fact the "domestic satellite facilities are proposed to be located upon a customer's premises", and that we were making available to the public one of the advantages which are uniquely offered by domestic satellite systems, a direct link between the two ends of the circuit. In the case of international traffic to and from GSFC, it would likely be routed to an INTELSAT earth station located a considerable distance from GSFC. RCA Globcom does not indicate the routing for the traffic. Neither does it represent that an INTELSAT earth station will be constructed at GSFC. Hence, the primary reasons underlying the Commission's determination to designate Stockton as a limited purpose gateway appear to be missing in the case of international GSFC traffic. Nor has RCA Globcom shown any additional public interest reason for the designation of GSFC as a limited purpose gateway. We must therefore also deny this RCA Globcom request.

26. Accordingly, the application of RCA Globcom for (1) permission to interconnect with RCA American Communications, Inc. for the provision of international communications to and from the Goddard Space Flight Center, or (2) to include the GSFC within the Washington, D.C. gateway, or (3) to designate the GSFC as a limited purpose gateway (File No. I-SP-3) IS DENIED. The Petition to Deny filed by the Western Union Telegraph Company IS GRANTED and the Petition to Deny filed by TRT Telecommunications Corporation IS GRANTED to the extent indicated herein, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

